INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165	9
Barkan v. *United States*, 362 F. 2d 158, certiorari denied, 385 U.S. 882	8
Beck v. *Washington*, 369 U.S. 541	7
Bruton v. *United States*, 391 U.S. 123	6
Craven v. *United States*, 22 F. 2d 605, certiorari denied, 276 U.S. 627	9
Duplex Printing Press Co. v. *Deering*, 254 U.S. 443	10
Louis K. Liggett Co. v. *Baldridge*, 278 U.S. 105	10
Marshall v. *United States*, 360 U.S. 310	7
Rathbun v. *United States*, 355 U.S. 107	9
Rosen v. *Sugarman*, 357 F. 2d 794	8
Small v. *United States*, 333 F. 2d 702	10
Stirone v. *United States*, 361 U.S. 212	10
Stroble v. *California*, 343 U.S. 181	7
Tynan v. *United States*, 376 F. 2d 761, certiorari denied, 389 U.S. 845	8
United States v. *Bell*, 351 F. 2d 868, certiorari denied, 383 U.S. 947	8
United States v. *Bowe*, 360 F. 2d 1, certiorari denied, 385 U.S. 961	7
United States v. *Kaufer*, 406 F. 2d 550, affirmed, 394 U.S. 458	9

380-102—70——1

Cases—Continued

	Page
United States v. *Kravitz*, 303 F. 2d 700, certiorari denied, 371 U.S. 922	8
United States v. *Valenti*, 120 F. Supp. 80	9
Willenbring v. *United States*, 306 F. 2d 944	9
Constitution and statutes:	
U.S. Constitution:	
Fourth amendment	9
Fifth amendment	10
Sixth amendment	6
Fourteenth amendment	10
Hobbs Act, 18 U.S.C. 1951	3, 9
28 U.S.C. 144	7

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1101

WILLIAM GRASSO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1224

RALPH TROPIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 418 F. 2d 1069.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1969. A petition for rehearing was denied on December 23, 1969. The petition for a writ of certiorari in No. 1101 was filed on January 22,

1970. In No. 1224, an extension of time until February 21 was obtained, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of a co-defendant's post-conspiracy exculpatory statement, which did not implicate petitioners and was offered only against that defendant, deprived petitioners of any Sixth Amendment rights (No. 1101).[1]

2. Whether the trial court erred in denying individual *voir dire* of the jurors (No. 1101).

3. Whether the trial judge erred in not disqualifying himself (No. 1101).

4. Whether the admission into evidence of a telephone conversation of a person who called the complaining witness at Grasso's suggestion, taped with the consent of the complaining witness, violated petitioners' constitutional rights (No. 1101).

5. Whether the acts proved constituted a violation of the Hobbs Act (Nos. 1101 and 1224).

6. Whether the evidence supports the verdict (No. 1224).

7. Whether petitioners received a fair trial (No. 1224).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioners were

[1] Each petitioner adopts the points of the other. In listing the petition number after the questions, we refer to the petition which primarily discusses the issue presented.

found guilty of conspiracy to violate and violation of the Hobbs Act (18 U.S.C. 1951). A co-defendant, Pellegrino, was convicted only of the substantive count. Petitioner Grasso (No. 1101) was sentenced to ten years' imprisonment on each count, the sentences to be served concurrently, and was fined $7,500 on the substantive count. Petitioner Tropiano (No. 1224) was sentenced to concurrent terms of twelve years' imprisonment and a $10,000 fine. The court of appeals affirmed both convictions (Pet. App. 1a–28a).

Petitioners Tropiano and Grasso and a third person were partners in the C & A Refuse Removal Company which collected rubbish in Milford, Connecticut. Co-defendant Pellegrino had an interest in the B & L Carting Corporation in Bridgeport, Connecticut. Leonard Caron, the complaining witness, conducted a rubbish removal business in the Bridgeport area.

In early 1967, Caron replaced the C & A Refuse Removal Company, the firm in which petitioners Grasso and Tropiano were partners, in servicing several stops in the Milford area. Shortly thereafter, Pellegrino arranged a meeting among himself, Caron, Grasso, and Tropiano. During this meeting Grasso told Caron to leave his accounts alone. If Caron did not cooperate, Grasso said, he would "push him out of Milford, way out if they needed to" (App. 182).[2] Tropiano told Caron that they "knew how to take care of" guys like him (*ibid.*).

[2] "App." refers to the appendix in the court below, a copy of which is on file with the Clerk of this Court.

Caron and his wife sought the aid of the Connecticut State Police, who installed a tape recorder in the Caron home for a two-day period, March 22–24, during which time Caron received one call from Grasso and one from the manager of the Milford Rivet Company, recordings of which were introduced by petitioners. The tape recorder was reinstalled during the period April 3–16. The only recording obtained during this time which was introduced as evidence was a portion of a conversation between Caron and a person who called at the instigation of Grasso to persuade Caron to give up the Milford Rivet stop (App. 1016, 965–967).

In late March, Caron obtained the Milford Rivet Company account which had formerly been serviced by petitioners' firm. Pellegrino arranged to have a special meeting of the Bridgeport Independent Refuse Collectors' Association (BIRCA), a loosely-knit trade and social organization of Bridgeport refuse dealers (App. 193). Both petitioners attended this meeting although they were not members of the group (App. 193). Caron testified that Grasso told the members that Caron should keep away from his customers. If the members did not cooperate in keeping Caron out, Grasso said, he would buy trucks, equip them with "muscle" and send them into Bridgeport to give the members a rough time (App. 245). Tropiano supported Grasso by telling the group that he had enough money to buy the trucks and furnish them with muscle (App. 245, 774). When Caron asserted his right to do business where he chose, Grasso told him that where he came from in New York, guys like Caron end up

either with their arms broken or in the river (App. 244). Grasso also stated that "you can stretch a rubber band just so far and its going to break and somebody is going to get hurt" (App. 245).[3]

In order to convince petitioners that her husband was not undercutting their service price, Mrs. Caron obtained a false purchase order from the manager of the firm and gave it to Pellegrino (App. 1297–1299). Later in April, Pellegrino told Caron that he was "a fool to consider servicing C & A's accounts" because he had a nice family and it would be a shame if something happened to his children on their way to school or to his wife (App. 259). The Carons took their children off the school bus and drove them to and from school until the end of the school year (App. 259, 1302–1303).

On July 4 Grasso arrived uninvited at Caron's home. Caron told Grasso that he would not give back the two accounts, but agreed not to solicit any more business in Milford and, specifically, not to solicit any of Grasso's customers (App. 260–261, 719–720).

ARGUMENT

1. In an interview with an FBI agent, Pellegrino denied being a member of BIRCA or knowing of its activities (App. 805). He denied attending the April 7 meeting of BIRCA at which the threats were made (App. 807). He also denied knowing petitioners or

[3] Various persons attending the meeting denied hearing remarks about "muscle" (App. 1418, 1499, 1527, 1582). Others admitted hearing the "rubber band" remark (App. 1246, 1270), and others referred to "trouble" at the meeting (App. 1044, 1597).

of their refuse business (App. 806). Pellegrino stated that he was unaware of any problem between Caron and petitioners (App. 807). Pellegrino did not take the stand at trial.

While recognizing that these statements were offered against Pellegrino alone and the jury was so instructed (App. 803–804), petitioners, relying on *Bruton* v. *United States*, 391 U.S. 123, contend the admission of such evidence violated their Sixth Amendment rights. They reason that, while the statements were offered as evidence of Pellegrino's "consciousness of guilt," any consciousness of guilt on his part must have been based on his consciousness of petitioners' guilt as well, since everyone agreed that at the April 7 meeting all Pellegrino did was to introduce petitioners. This reasoning overlooks the fact that, by denying all knowledge of the parties and issues involved, Pellegrino hoped to insulate himself from threats which he had made at other times (App. 259, 1296). More basically, the reasoning is erroneous in assuming that petitioners' right of confrontation was violated merely because evidence admitted against one defendant alone tended to support his guilt. It is undisputed that Pellegrino's statements in no way implicated petitioners. The fact that his actions in lying about the meeting might tend to convince the jury of his guilt did not convert his statements into evidence against petitioners. *Bruton* is thus inapposite, as the court below properly concluded (Pet. App. 20a–22a).

2. Articles linking petitioners with organized crime appeared in several Connecticut newspapers in Feb-

ruary 1968. Other articles and an interview with the Assistant United States Attorney appeared in March 1968, when the indictment was returned. Between March and October, the time of the trial, no further personal information concerning petitioners appeared in the press.

At trial, after denying motions for individual *voir dire* and for a change of venue, the trial judge proceeded to question the veniremen *en bloc*. On three occasions he asked whether they had heard or read anything about the case. Two of the veniremen remembered having read about the case, but in both instances the article was a recent one which merely concerned the assignment of the case for hearing (Tr. 42–44).

In determining the impact of prior adverse publicity, each case must turn on its own special facts. *Marshall* v. *United States*, 360 U.S. 310, 312. Here the complained of publicity occurred in February and March while the trial did not begin until October. Not infrequently, such a lapse of time effectively erodes the damaging statements from the minds of the jurors. *Beck* v. *Washington*, 369 U.S. 541, 555–558, rehearing denied, 370 U.S. 965; *Stroble* v. *California*, 343 U.S. 181. The matter of conducting an individualized *voir dire* rests in the discretion of the judge. *United States* v. *Bowe*, 360 F. 2d 1 (C.A. 2), certiorari denied, 385 U.S. 961. In view of the seven-month lapse of time that was present in this case, there was no abuse of that discretion here.

3. Nor did the trial judge err in refusing to disqualify himself for personal bias or prejudice. In an affidavit submitted under 28 U.S.C. 144, petitioner

Grasso alleged as grounds for his belief that the judge was biased that he had had a private conference with the Assistant United States Attorney before the hearing on bail, and had thereafter granted the government's request that bail be set at $25,000.

While a judge when presented with such an affidavit must accept the facts alleged as true, it is still his duty to pass on the sufficiency of the affidavit as a matter of law. *United States* v. *Bell,* 351 F. 2d 868 (C.A. 6), certiorari denied, 383 U.S. 947. To be sufficient, the affidavit "must show 'the objectionable inclination or disposition of the judge'; it must give 'fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.'" *Rosen* v. *Sugarman,* 357 F. 2d 794, 798 (C.A. 2). To be relevant, any such alleged personal bias must be of extrajudicial origin (*Tynan* v. *United States,* 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845), and an affidavit is insufficient if based on prior adverse judicial rulings or findings (*Barkan* v. *United States,* 362 F. 2d 158 (C.A. 7), certiorari denied, 385 U.S. 882). In the instant case the mere fact that the judge set the bond and presided at the bail hearing, thereby becoming familiar with petitioner's criminal record, did not disqualify him from presiding at a trial where a jury was to determine petitioner's guilt or innocence (*United States* v. *Kravitz,* 303 F. 2d 700 (C.A. 3), certiorari denied, 371 U.S. 922). And the fact that the Assistant United States Attorney had a private conference with the judge prior to the bail hearing, which meeting was devoted to a discussion of administrative matters, is, without more,

not indicative of personal bias or prejudice. *Willenbring* v. *United States,* 306 F. 2d 944 (C.A. 9); *Craven* v. *United States,* 22 F. 2d 605 (C.A. 1), certiorari denied, 276 U.S. 627; *United States* v. *Valenti,* 120 F. Supp. 80 (D. N.J.).

4. At the request of Caron, the State police placed a recording device on his home telephone. While several conversations between Grasso and Caron were recorded, the only recording the government put in evidence was one between Caron and Peter Bertase.[4] Since neither petitioner was a party to this conversation, there is no basis for a claim of violation of his Fourth Amendment right. *E.g., Alderman* v. *United States,* 394 U.S. 165, 171–176. Moreover, the right to record a telephone conversation where one of the parties consents was upheld in *Rathbun* v. *United States,* 355 U.S. 107. There is no reason to delay action on this petition pending decision of the different issue presented in *United States* v. *White,* No. 46, this Term, where the respondent himself was involved in the overheard conversations. See *United States* v. *Kaufer,* 406 F. 2d 550 (C.A. 2), affirmed, 394 U.S. 458.

5. The contentions, made in both petitions, that the acts proved did not constitute a violation of the Hobbs Act are without merit. The claim that there was not a sufficient connection with interstate commerce is answered by the wording of the Act itself, which provides that "[w]hoever in *any way or degree* obstructs, delays, or affects commerce or the move-

[4] Petitioner Grasso introduced a tape of a telephone conversation he had with Caron, which the police had recorded.

ment of any article or commodity in commerce" shall be guilty of violating this section (emphasis added). As this Court said in *Stirone* v. *United States*, 361 U.S. 212, 215, "[the] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." In the instant case, Caron employed trucks and containers manufactured by a corporation in Tennessee and purchased from the corporation's representative in New York. By interfering with Caron's right to solicit new customers, petitioners clearly affected interstate commerce by decreasing the number of containers and trucks Caron would need to service his customers.

Grasso contends that no "property" was extorted because all Caron relinquished was his right to solicit new accounts; he admits that the right to solicit new accounts is a "valuable" right, but disputes whether it is property (Pet. 34). The right to pursue a lawful business has, however, long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments. See *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105; *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443; *Small* v. *United States*, 333 F. 2d 702 (C.A. 3). The right to solicit new customers is an integral part of the right to carry on a business. Petitioners obtained direct benefit from their acts because Caron, who had already taken over two of petitioner's accounts, agreed not only that he would not solicit any more business in the town but specifically not solicit any of petitioners' customers.

Clearly, Caron's right to solicit accounts in Milford constituted property within the Hobbs Act definition, and an offense thereunder was made out.

6. The gravamen of the lengthy petition in No. 1224 is that the jury should not have credited the testimony of Caron. The issue is discussed at considerable length in the opinion below which upheld the sufficiency of the evidence. Since petitioner Tropiano has filed a copy of his brief in the court of appeals, we are filing a copy of the government's brief which recites the evidence in greater detail than is appropriate in response to the petitions. We rely thereon, and on the opinion below (Pet. App. 3a–10a), in regard to the sufficiency of the evidence to support the convictions.

7. The claim that petitioners were denied a fair trial, particularly with respect to the trial judge's handling of testimony as to petitioners' reputations, is amply answered in the opinion below (Pet. App. 18a–20a) and in the government's brief in the court of appeals filed herewith. As there set forth (pp. 28–35), the trial judge took particular care to limit the possibility of prejudice to petitioners by declining to allow Caron to go into specifics as to petitioners' bad reputations and by its instructions on this issue. The other contentions are fully dealt with in the comprehensive opinion of the court of appeals, or are plainly frivolous.[5]

[5] For example, petitioners contend that their convictions both for conspiracy and a substantive count based upon the same conduct constituted impermissible double punishment, notwithstanding that they received concurrent sentences.

CONCLUSION

It is accordingly respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE R. ROSENBERG,
KAREN L. ATKINSON,
Attorneys.

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